

8-21-01 16:55 From-LUCE FORWARD HAMILTON AND SCRIPPS LLP 2338927731 T-645 P.10/15 F-781
 RE: 8/21/01 1:48 PAGE 10/19 RIGHTEAA

1 Lynch. Clark's position is undermined by the Financial Consultant Agreement, in which he agreed
 2 that "names, addresses, phone numbers, and financial information of any account, customer, client,
 3 customer lead or prospect ("Account"), are confidential and are the sole and exclusive property of
 4 Merrill Lynch." Clark knew at the start of his employment that customer information was the
 5 property of Merrill Lynch.

6 Even if Merrill Lynch's customer list is entitled to trade secret protection, Clark contends
 7 he did not misappropriate any trade secrets. The UTSA defines misappropriation as:

- 8 (1) Acquisition of a trade secret of another by a person who knows or has reason to
 know that the trade secret was acquired by improper means; or
- 9 (2) Disclosure or use of a trade secret of another without express or implied consent
 by a person who:
 - 10 (A) Used improper means to acquire knowledge of the trade secret; or
 - 11 (B) At the time of disclosure or use, knew or had reason to know that his or her
 knowledge of the trade secret was:
 - 12 (i) Derived from or through a person who had utilized improper means to acquire it,
 - 13 (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or
 limit its use; or
 - 14 (iii) Derived from or through a person who owed a duty to the person seeking relief
 to maintain its secrecy or limit its use; or
 - 15 (C) Before a material change of his or her position, knew or had reason to know that
 it was a trade secret and that knowledge of it had been acquired by accident or
 mistake.

16 Cal Civil Code § 3426(b).

17 Soliciting customers by using information from a protected customer list constitutes
 18 misappropriation MAI, 991 F.2d at 521. "Merely informing customers of ones former employer
 19 of a change of employment, without more, is not solicitation." Aetna Bldg. Maintenance Co. v.
 20 West, 39 Cal.2d 198, 204 (1952). Employees are entitled to use trade secret information such as
 21 names and addresses of customers to announce the employee's association with a new firm. Mose,
 22 Adams & Co. v Shilling, 179 Cal.App.3d 124, 126, 246 P.2d 11, 15 (1986).

23 Clark asserts that he did not misappropriate trade secrets because he did no more than
 24 announce a change in employment. Clark's conduct here goes well beyond announcing a change
 25 of employment and crosses over into solicitation. The letter PaineWebber sent informing Clark's
 26 clients of his employment change did more than merely announce that change. It informed the
 27 client that "account with UBS PaineWebber can be of tremendous benefit to you as an investor"
 28 and noted that PaineWebber has been in business for over 100 years. The letter concluded by

08-21-01 16:56 From:LUCE FORWARD HAMILTON AND SCRIPPS LLP 2138927731 T-645 P.11/15 F-781
 SDC 8/21/01 1:48 PAUSE 11/15 RIGHTRAN

1 stating that Clark "is looking forward to continuing his investment relationship with you" To
 2 facilitate this continued relationship, PaineWebber enclosed pre-completed account transfer forms,
 3 which included that client's name, and most importantly, the client's Merrill Lynch account
 4 number. Contrary to Clark's assertion that he merely used names and phone numbers of friends
 5 and relatives that he knew independent of his association with Merrill Lynch, he also retained
 6 Merrill Lynch account numbers, which he could not have known but for his employment with
 7 Merrill Lynch. The only conclusion to be drawn from PaineWebber's letter and enclosed account
 8 transfer forms is that Clark disclosed the account numbers to PaineWebber and used them to solicit
 9 business for PaineWebber, in violation of Merrill Lynch's trade secret rights. Accordingly, the
 10 court concludes that Merrill Lynch has demonstrated a reasonable likelihood of success on the
 11 merits with respect to its misappropriation of trade secrets claim.

12 C. Irreparable Harm

13 The court also finds that Merrill Lynch has demonstrated the possibility of irreparable
 14 harm. While Clark is probably correct that Merrill Lynch's primary concern is recovering any lost
 15 commission income, Clark has offered no way to calculate the commissions Merrill Lynch would
 16 lose if Clark is not enjoined from soliciting Merrill Lynch customers. See Merrill Lynch, Pierce,
Fenner & Smith, Inc. v. Stidham, 658 F.2d 1098, 1102 n.8 (5th Cir. 1981) ("Were defendant
 17 permitted by the law to exploit the clientele of their former employers, every investment that
 18 reasonably flowed from the exploitation should be included in the damages award. How such a
 19 figure could be arrived at escapes us."); Merrill Lynch, Pierce, Fenner, & Smith, Inc. v.
Hagerty, 808 F.Supp. 1555, 1559-60 (S.D. Fla. 1992) (discussing difficulty in calculating damages
 20 from financial advisor's use of customer list to solicit former employer's customers). In any event,
 21 Clark's breach of confidentiality constitutes irreparable harm. See Merrill Lynch, Pierce, Fenner &
Smith v. Kramer, 816 F.Supp. 1242, 1247 (N.D. Ohio 1992) ("Irreparable and unmeasurable harm
 22 lies in the fact that Merrill Lynch clients, when they discover that their financial information,
 23 market transactions, and investment assets which they presumed were held in confidence have been
 24 disclosed, will lose trust and confidence in Merrill Lynch").

25 Clark contends that the harm he will suffer in not being able to earn a living outweighs any

18-21-01 16:56 From-LUCE FORWARD HAMILTON AND SCRIPPS LLP 2138827731 T-645 P-12/15 F-761
 C 6/21/01 1:48 PAGE 12/15 RightFax

1 possible harm Merrill Lynch will suffer in the absence of a TRO. But any harm that Clark will
 2 suffer in not being able to reap the benefits of his solicitation efforts is self-inflicted. He was aware
 3 of the non-solicitation clause in the Financial Consultant Agreement and of the fact that Merrill
 4 Lynch holds a proprietary interest in customer information. If Clark had abided by the terms of his
 5 agreement and sent a letter announcing his move to PaineWebber instead of a solicitation letter, he
 6 would have been free accept any account transfers and Merrill Lynch would have had no basis to
 7 seek a TRO.

8 Clark maintains that the court should not issue a TRO in Merrill Lynch's favor because of
 9 its unclean hands. He claims that Merrill Lynch has not paid him all of his commissions. The
 10 unclean hands defense arises from the equitable maxim, "He who comes into Equity must come
 11 with clean hands." Kendall-Jackson Winery, Ltd v. Superior Court, 76 Cal App 4th 970, 978, 90
 12 Cal.Rptr. 2d 743, 748 (2000). The defense applies in legal as well as equitable actions. Id. at 978,
 13 90 Cal Rptr. 2d at 749. The plaintiff's misconduct must relate directly to the transaction at issue.
 14 Camp v. Jeffer, Mangels, Butler & Marmaro, 35 Cal.App.4th 620, 638, 41 Cal Rptr.2d 329, 638-39
 15 (1995). A defendant cannot successfully assert the defense if the plaintiff's misdeeds relate to
 16 earlier dealings between the parties and not the current transaction. Fibreboard Paper Products
 17 Corp. v. East Bay Union of Machinists, 227 Cal App 2d 675, 728-29, 39 Cal Rptr. 64, 97 (1964).
 18 Clark's assertion that he has not been fully paid is unrelated to Merrill Lynch's trade secrets
 19 misappropriation claim. Therefore, the unclean hands defense does not apply.

20 Finally, Clark raises concerns that a TRO will not serve the public interest because it will
 21 prevent customers who may want Clark to continue to service their accounts from transferring their
 22 accounts to Clark at PaineWebber. The countervailing concern is that Clark should not benefit
 23 from misappropriating trade secrets and breaching confidentiality by being able to accept account
 24 transfers from clients of Merrill Lynch whom he improperly solicited. The terms of the TRO
 25 Merrill Lynch proposes do not adequately balance these interests. Therefore, the court will modify
 26 the terms of the proposed TRO to permit Clark to accept account transfers from his former clients
 27 at Merrill Lynch subject to the following conditions. If clients use already completed account
 28 transfer forms to request account transfers, Clark must (1) inform the clients in writing that this

08-21-01 16:57 From-LUCE FORWARD HAMILTON AND SCRIPPS LLP 2138827791 T-645 P.13/15 F-781
SDC 8/21/01 1:48 PAGE 13/15 RightFAX

1 court preliminarily determined that the use of the already completed forms was a form of unlawful
2 solicitation, and (2) advise the clients that if they still want to transfer their accounts, they must
3 complete new account transfer forms and supply information regarding their Merrill Lynch
4 accounts

5 **IV.**

6 **DISPOSITION**

7 ACCORDINGLY, IT IS ORDERED THAT

8 1) Defendant is enjoined and restrained, directly and indirectly, and whether alone or in concert
9 with others, including any agent representative, officer, or employee of Defendant's current
10 employer, PaineWebber, until hearing and thereafter and until further Order of this Court, from:

11 (a) soliciting any business from, or initiating any further contact or communication with any
12 client of Merrill Lynch whom Defendant served or whose name became known to Defendant while
13 in the employ of Merrill Lynch including for the purpose of inviting, encouraging, or requesting the
14 transfer of any accounts from Merrill Lynch to Clark's new employer (excluding members of
15 Defendant's family and relatives);

16 (b) accepting any business or account transfers from any clients whom Defendant, or any
17 one acting on Defendant's behalf or in concert with Defendant, has solicited at any time in the past
18 for the purpose of doing business with Defendant's new employer, PaineWebber (excluding
19 member of Defendant's family and relatives) if those clients request account transfers using already
20 completed account transfer forms unless Defendant:

21 1) informs the clients in writing that this court preliminarily determined that the use of
22 already completed account transfer forms was a form of unlawful solicitation, and
23 (2) advises the clients that if they still want to transfer their accounts, they must complete
24 new account transfer forms and supply information regarding their Merrill Lynch accounts,
25 and

26 (c) accepting any business , including account transfers, from any customer whose records
27 or information Defendant used in violation of his contractual and trade secret obligations to Merrill
28 Lynch, including Defendant's Financial Consultant Employment Agreement and Restrictive

BB-21-01 16:57 From-LUCE FORWARD HAMILTON AND SCRIPPS LLP 2138827731 T-845 P.14/15 F-781
C 8/21/01 1:48 PAGE 14/15 RightFAX

1 Covenants, and any customer whom Defendant solicited through the use of any customer
2 information obtained by Defendant while in the employ of Merrill Lynch (excluding members of
3 Defendant's family and relatives) if those customers request account transfers using already
4 completed account transfer forms unless Defendant:

5 1) informs the customers in writing that this court preliminarily determined that the use of
6 already completed account transfer forms was a form of unlawful solicitation, and
7 (2) advises the customers that if they still want to transfer their accounts, they must
8 complete new account transfer forms and supply information regarding their Merrill Lynch
9 accounts; and

10 (d) using, disclosing, or transmitting for any purpose, including the solicitation or
11 acceptance of business or account transfers, the information contained in the records of Merrill
12 Lynch; and that all original records and copies and/or other reproductions thereof, in whatever
13 form, be returned to Merrill Lynch's Palm Springs, California office immediately.

14 2) IT IS FURTHER ORDERED that Defendant, and anyone acting in concert or participation with
15 Defendant, including Defendant's counsel and any agent, employee, officer or representative of
16 Defendant's current employer, PaineWebber, shall return to Merrill Lynch's Palm Springs,
17 California office any and all records or information pertaining to Merrill Lynch's customers
18 whether in original, copied, computerized, handwritten or any other form, and purge any such
19 information from his possession, custody, or control, within 24 hours of notice to Defendant or his
20 counsel of the terms of this Order provided, however, that any information so purged shall be
21 printed prior to purging and be returned to Merrill Lynch pursuant to this paragraph

22 IT IS FURTHER ORDERED AS FOLLOWS:

23 1) Pending a preliminary injunction hearing before this court, and pursuant to the requirement of
24 section 3 and 4 of the Federal Arbitration Act, 9 U.S.C. § 3-4, the parties are directed to commence
25 and to proceed with arbitration in accordance with Rule 10335(g) of the National Association of
26 Securities Dealers Code of Arbitration Procedure

27 2) Defendant shall show cause before this court on August 30, 2001 at 10:00 a.m., or as soon
28 thereafter as counsel may be heard, why a preliminary injunction should not be ordered according

08-21-01 16:57 From-LUCE FORWARD HAMILTON AND SCRIPPS LLP 2138927731 T-645 P.15/15 F-781
SDC 8/21/01 1:48 PAGE 15/15 RightFAX

- 1 to the terms and conditions set forth above
2 3) Defendant shall serve and file his opposition no later than August 27, 2001 at noon
3 4) Plaintiff shall file and serve its reply no later than August 29, 2001 at noon.
4 5) The parties are granted leave to take expedited deposition discovery prior to the preliminary
5 injunction hearing referred to hereinabove.
6 6) Plaintiff shall file an undertaking in the sum of \$ 10,000.00 with the Clerk of this Court no later
7 than August 23, 2001 This Order shall not be effective until the undertaking is filed
8 This Order shall remain in full force and effect until such time as this court specifically
9 orders otherwise

10
11 8/20/01 Robert J. Timlin
12 DATE ROBERT J. TIMLIN, DISTRICT COURT JUDGE
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT G

FROM DEPT 61

TO:

TMS&P

MAY 18, 1996 9:55AM P.61

1 RUBIN & ASSOCIATES, P.C.
 2 Michael J. Fortunato
 3 Mack Harbison
 4 10 South Leopard Road
 5 MCS Building, Suite 202
 6 Paoli, Pennsylvania 19301-1534
 7 Telephone: (610) 408-2005

8 TROOP MEISINGER STEUBER & PASICH, LLP
 9 Anthony J. Oncidi (State Bar No. 118135)
 10 Elizabeth A. Casey (State Bar No. 137281)
 11 10940 Wilshire Boulevard, Suite 800
 12 Los Angeles, California 90024-3902
 13 Telephone: (310) 824-7000

14 Attorneys for Plaintiff
 15 ORANGE MERRILL LYNCH, PIERCE, FENNER & SMITH INC.

RECEIVED

SHERIFF'S OFFICE

FILED
 ORANGE COUNTY SUPERIOR COURT

MAY 10 1996

ALAN SLATER, COMMISSIONER

P. Hale
 BY P. GALE

16 MAR 1996 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 ALAN SLATER, COMMISSIONER FOR THE COUNTY OF ORANGE

18 DIA [redacted] DEPUTY

19 MERRILL LYNCH, PIERCE, FENNER &
 20 SMITH INC., a Delaware corporation,

Plaintiff,

CASE NO. 759911

[ASSIGNED FOR ALL PURPOSES TO:
 HON. ROBERT J. POLIS
 DEPARTMENT 61]

21 THOMAS M. NICHOLSON, an individual

[PROPOSED] PRELIMINARY
 INJUNCTION22 Date: March 8, 1996
 Time: 9:30 a.m.
 Dept: 6123 Action Filed: February 21, 1996
 Trial Date: None Set

LOS ANGELES, CALIFORNIA 90000
 MAIN TELEPHONE 213/481-4000
 FAX FACSIMILE 213/481-4000

AJD:msb/klp (for ALAN SLATER, L.P.)
 05/1996 16:00
 THREE MILLIONER ATTORNEYS & PARTNERS, L.P.

FROM DEPT 61

TOK

THS&P

MAY 18, 1996

9:55AM P.82

Upon reviewing all of the files and records in this action, including the declarations and memoranda filed by counsel, on application of plaintiff Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") and having concluded that Merrill Lynch, under section 47 of the National Association of Securities Dealers Code of Arbitration Procedure, has the express right to seek preliminary injunctive relief from a court of competent jurisdiction pending an arbitration hearing before a full panel of duly-appointed arbitrators:

IT IS HEREBY ORDERED that:

1. Defendant Thomas M. Nicholson ("Defendant") and all those acting in active concert or participation with him, including, but not limited to, any officer, agent, representative, or employee of Defendant's current employer, A.G. Edwards & Son, Inc. ("A.G. Edwards"), are, and have been since February 21, 1996, enjoined from soliciting any business from any client of Merrill Lynch (excluding Defendant's immediate family) whom Defendant served or whose name became known to Defendant while he was in the employ of Merrill Lynch and are, and have been since February 21, 1996, enjoined from accepting any business or account transfers from any of said customers (excluding Defendant's immediate family) whom Defendant has solicited in the past for the purpose of doing business with A.G. Edwards;

2. Defendant and all those acting in active concert or participation with him, including, but not limited to, any officer, agent, representative, or employee of A.G. Edwards, are, and have been since February 21, 1996, enjoined from using, disclosing, or transmitting for any purpose, including solicitation of said customers, the information contained in the records of Merrill Lynch, including, but not limited to, the names, addresses, and financial information of the clients listed in Exhibit "C" to Merrill Lynch's Complaint; and

3. Defendant and all those acting in active concert or participation with him, including, but not limited to, any officer, agent, representative, or employee of A.G. Edwards, are, and have been since February 21, 1996, ordered to return to Merrill Lynch all of its original records and copies and/or transcriptions and/or computerized transcriptions thereof in any such person's or entity's possession, custody, or control.

AMERICAN COURTS ONLINE
051996 00:00
From: *[Redacted]* [Redacted] to: *[Redacted]* [Redacted]

FROM:DEPT 61

TO:

THSLP

MAY 10, 1996

9:55AM P.63

1 4. Attached hereto and incorporated herein by this reference are the Court's March
2 7, 1996 and March 15, 1996 Orders.

3 5. Merrill Lynch shall post a preliminary injunction bond in the amount of
4 \$10,000.00 no later than 5-13, 1996. 4:30pm.

5 Dated: MAY 10 1996, 1996.

6 ROBERT J. POLIS
7 JUDGE OF THE SUPERIOR COURT

LAWYERS
10640 WILMING BOULDER
LOS ANGELES, CALIFORNIA 90040-3002
MAIN TELEPHONE 310-472-7000
FAX FACSIMILE 310-472-7272

AUTOMATED INJUNCTIONS/INJUNCTIVE
031996 10:00
Faxon Worldwide Equities & Financial Corp.

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the matter of the Arbitration Between

Name of Claimant

Merrill Lynch, Pierce, Fenner & Smith, Inc.

NASD Arbitration
No. 96-00774

Name of Respondents

A.G. Edwards & Sons, Inc. and Thomas M. Nicholson

REPRESENTATION

For Claimant:

Michael J. Fortunato, Esq.
Rubin & Associates, P.C.
Paoli, Pennsylvania

For Respondent

A.G. Edwards & Sons, Inc.:

Jeff Jamieson, Esq.
A.G. Edwards & Sons, Inc.
St. Louis, Missouri

For Respondent

Thomas M. Nicholson:

Peter A. Goldenting, Esq.
Goldenting & Prosser
Ventura, California

CASE INFORMATION

Statement of Claim filed: February 22, 1996

Claimant's Submission Agreement signed: February 21, 1996

Joint Statement of Answer filed by Respondents: April 16, 1996

HEARING INFORMATION

Pre-Hearing Conference Dates / Sessions: May 15, 1996 (1 session)
June 11, 1996 (1 session)

Hearing Dates / Sessions: June 13, 1996 (2 sessions)
June 14, 1996 (2 sessions)
June 18, 1996 (2 sessions)
June 19, 1996 (2 sessions)
June 20, 1996 (2 sessions)

Hearing Location: Los Angeles, California

CASE SUMMARY

Claimant alleged that Respondent Nicholson violated the terms and conditions of his employment contract with Claimant. Claimant further alleged that Respondents misappropriated and converted Claimant's trade secrets and business property, breached their fiduciary duty, and engaged in unfair competition.

Respondents denied all of Claimant's allegations.

RELIEF REQUESTED

Claimant sought a permanent injunction order enjoining Respondents from soliciting any business from Respondent Nicholson's former clients, and from using, disclosing, or transmitting any information contained in Claimant's business records. Claimant also requested compensatory damages in an amount to be determined at the arbitration hearing.

Respondent asked that the claim be dismissed in its entirety, and that the NASD sanction the Claimant for making conflicting and inconsistent representations to the NASD and the Superior Court of the State of California for the County of Orange.

OTHER ISSUES CONSIDERED AND DECIDED

The parties have agreed that the Award in this matter may be executed in either counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the original remains on file with the NASD.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant is awarded permanent injunctive relief against Respondents. The permanent injunction order shall incorporate the present terms of the preliminary injunction, and will run for a period of one (1) year from the date of Respondent Nicholson's termination, February 16, 1996.
2. Respondents A.G. Edwards & Sons, Inc. and Thomas M. Nicholson are jointly and severally liable and shall pay Claimant the sum of \$270,000.00 in damages.
3. Respondents A.G. Edwards & Sons, Inc. and Thomas M. Nicholson are jointly and severally liable for forum fees.
4. The parties shall bear their respective costs, including attorneys' fees.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following forum fees are assessed against the Respondents, jointly and severally:

| | | |
|--|---|-------------|
| Two Pre-Hearing Conferences @ \$300.00 / Session | = | \$600.00 |
| Ten Hearing Sessions @ \$1,000.00 / Session | = | \$10,000.00 |
| Total Forum Fees Assessed | = | \$10,600.00 |
| | | |
| Respondents A.G. Edwards & Sons, Inc. and Thomas M. Nicholson Balance Due | = | \$10,600.00 |

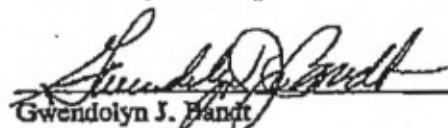
Fees are payable to the National Association of Securities Dealers, Inc.

ARBITRATORS

| Name | Public / Industry |
|-------------------------|---------------------|
| Louis R. Eglash, Esq. | Public Arbitrator |
| Gwendolyn J. Bandt | Industry Arbitrator |
| Douglas J. Rovens, Esq. | Public Arbitrator |

Concurring Arbitrators' Signatures

Louis R. Eglash, Esq.



Gwendolyn J. Bandt

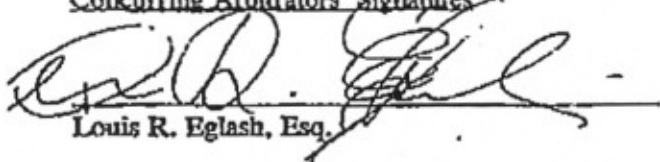
Douglas J. Rovens, Esq.

Date of Decision: _____

ARBITRATORS

| | |
|-------------------------|---------------------|
| Name | Public / Industry |
| Louis R. Eglash, Esq. | Public Arbitrator |
| Gwendolyn J. Bandt | Industry Arbitrator |
| Douglas J. Rovens, Esq. | Public Arbitrator |

Concurring Arbitrators' Signatures



Louis R. Eglash, Esq.

Gwendolyn J. Bandt

Douglas J. Rovens, Esq.

Date of Decision: _____

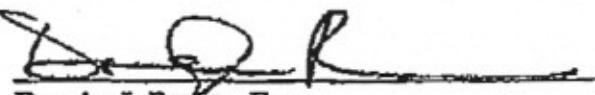
ARBITRATORS

| | |
|-------------------------|---------------------|
| Name | Public / Industry |
| Louis R. Egash, Esq. | Public Arbitrator |
| Gwendolyn J. Bandt | Industry Arbitrator |
| Douglas J. Rovens, Esq. | Public Arbitrator |

Concurring Arbitrators' Signatures

Louis R. Egash, Esq.

Gwendolyn J. Bandt


Douglas J. Rovens, Esq.

Date of Decision: _____

EXHIBIT H



Location: NASD > Manual > Rules of the Association > Procedural Rules (8000–14000) > 13000. NASD Code of Arbitration Procedure for Industry Disputes > Part VIII Simplified Arbitration; Default Proceedings; Statutory Employment Discrimination Claims; and Injunctive Relief > 13804. Temporary Injunctive Orders; Requests for Permanent Injunctive Relief

<< Previous

Next >>

13804. Temporary Injunctive Orders; Requests for Permanent Injunctive Relief

NASD Notices to
Members
(1 link)

The Industry Code will apply to claims filed on or after April 16, 2007. In addition, the list selection provisions of the Industry Code will apply to previously filed claims in which a list of arbitrators must be generated after April 16, 2007; in these cases, however, the claim will continue to be governed by the remaining provisions of the old Code unless all parties agree to proceed under the new Code. Contact your case administrator for details.

(a) Temporary Injunctive Orders

(1) In industry or clearing disputes required to be submitted to arbitration under the Code, parties may seek a temporary injunctive order from a court of competent jurisdiction. Parties to a pending arbitration may seek a temporary injunctive order from a court of competent jurisdiction even if another party has already filed a claim arising from the same dispute in arbitration pursuant to this paragraph, provided that an arbitration hearing on a request for permanent injunctive relief pursuant to paragraph (b) of this rule has not yet begun.

(2) A party seeking a temporary injunctive order from a court with respect to an industry or clearing dispute required to be submitted to arbitration under the Code must, at the same time, file with the Director a statement of claim requesting permanent injunctive and all other relief with respect to the same dispute in the manner specified under the Code. The party seeking temporary injunctive relief must also serve the statement of claim requesting permanent injunctive and all other relief on all other parties in the same manner and at the same time as the statement of claim is filed with the Director.

(3) Filings and service under this rule must be made by facsimile, overnight delivery service or messenger. Service must be made on all parties at the same time and in the same manner, unless the parties agree otherwise. A party obtaining a court-issued temporary injunctive order must notify the Director and the other parties of the issuance of the order within one business day.

(b) Hearing on Request for Permanent Injunctive Relief

(1) Scheduling of Hearing

If a court issues a temporary injunctive order, an arbitration hearing on the request for permanent injunctive relief will begin within 15 days of the date the court issues the temporary injunctive order. If the 15th day falls on a Saturday, Sunday, or NASD holiday, the 15-day period shall expire on the next business day. Unless the parties agree otherwise, a hearing lasting more than one day will be held on consecutive days when reasonably possible. The Director will provide to all parties notice of the date, time and place of the hearing at least three days prior to the beginning of the hearing.

(2) Composition of Arbitration Panel

The hearing on the request for permanent injunctive relief will be heard by a panel of three arbitrators. The composition of the panel will be determined in accordance with Rule 13402.

(3) Selection of Arbitrators and Chairperson

(A)(i) In cases in which all of the members of the panel are non-public, the Director will generate and provide to the parties a list of seven arbitrators from NASD's roster of non-public arbitrators. The Director will send to the parties the employment history for the past 10 years for each listed arbitrator and other background information. At least three of the arbitrators listed shall be lawyers with experience litigating cases involving injunctive relief.

(ii) Each party may exercise one strike to the arbitrators on the list. Within three days of receiving the list, each party shall inform the Director which arbitrator, if any, it wishes to strike, and shall rank the

remaining arbitrators in order of preference. The Director shall consolidate the parties' rankings, and shall appoint arbitrators based on the order of rankings on the consolidated list, subject to the arbitrators' availability and disqualification.

(B)(i) In cases in which the panel consists of a majority of public arbitrators, the Director will generate and provide to the parties a list of nine arbitrators from NASD's roster of arbitrators. The Director shall send to the parties employment history for the past 10 years for each listed arbitrator and other background information. At least a majority of the arbitrators listed shall be public arbitrators, and at least four of the arbitrators listed shall be lawyers with experience litigating cases involving injunctive relief.

(ii) Each party may exercise two strikes to the arbitrators on the list. Within three days of receiving the list, each party shall inform the Director which arbitrators, if any, it wishes to strike, and shall rank the remaining arbitrators in order of preference. The Director will combine the parties' rankings, and will appoint arbitrators based on the order of rankings on the combined list, subject to the arbitrators' availability and disqualification.

(C)(i) Each party must inform the Director of its preference of chairperson of the panel by the close of business on the next business day after receiving notice of the panel members.

(ii) If the parties do not agree on a chairperson within that time, the Director shall select the chairperson. In cases in which the panel consists of a majority of public arbitrators, the Director will select a public arbitrator as chairperson. Whenever possible, the Director will select as chairperson the lawyer with experience litigating cases involving injunctive relief whom the parties have ranked the highest.

(D) The Director may exercise discretionary authority and make any decision that is consistent with the purposes of this rule and the Code to facilitate the appointment of panels and the selection of chairperson.

(4) Applicable Legal Standard

The legal standard for granting or denying a request for permanent injunctive relief is that of the state where the events upon which the request is based occurred, or as specified in an enforceable choice of law agreement between the parties.

(5) Effect of Pending Temporary Injunctive Order

Upon a full and fair presentation of the evidence from all relevant parties on the request for permanent injunctive relief, the panel may prohibit the parties from seeking an extension of any court-issued temporary injunctive order remaining in effect, or, if appropriate, order the parties jointly to move to modify or dissolve any such order. In the event that a panel's order conflicts with a pending court order, the panel's order will become effective upon expiration of the pending court order.

(6) Fees, Costs and Expenses, and Arbitrator Honorarium

(A) The parties shall jointly bear reasonable travel-related costs and expenses incurred by arbitrators who are required to travel to a hearing location other than their primary hearing location(s) in order to participate in the hearing on the request for permanent injunctive relief. The panel may reallocate such costs and expenses among the parties in the award.

(B) Each party seeking a temporary injunctive order in court pursuant to this rule must pay a non-refundable surcharge of \$2,500 at the time the party files its statement of claim and request for permanent injunctive relief. In the award, the panel may decide that one or more parties must reimburse a party for part or all of the surcharge. The surcharge is in addition to all other non-refundable filing fees or costs that are required under the Code.

(C) Notwithstanding any other provision in the Code, the chairperson of the panel hearing a request for permanent injunctive relief pursuant to this rule shall receive an honorarium of \$375 for each single session, and \$700 for each double session, of the hearing. Each other member of the panel shall receive an honorarium of \$300 for each single session, and \$600 for each double session, of the hearing. The parties shall equally pay the difference between these amounts and the amounts panel members and the chairperson receive under the Code pursuant to Rule 13214. The panel may reallocate such amount among the parties in the award.

(c) Hearing on Damages or Other Relief

(1) Upon completion of the hearing on the request for permanent relief, the panel may, if necessary, set a date for any subsequent hearing on damages or other relief, which shall be held before the same panel and which shall include, but not be limited to, the same record.

(2) The parties shall jointly bear reasonable travel-related costs and expenses incurred by arbitrators who are required to travel to a hearing location other than their primary hearing location(s) in order to participate in any subsequent hearings on damages or other relief. The panel may reallocate such costs and expenses among the parties

in the award.

Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices to Member: 07-07

[« Previous](#)

[Next »](#)

© 2007 NASD. All rights reserved.